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March 22, 2011

Ms. Anne M. Constantine
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OR2011-03902

Dear Ms. Constantine:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 411901.

The Dallas/Fort Worth International Airport Board (the "board") received a request for the proposals, excluding the requestor's company's proposal, submitted in response to solicitation number 7005303, Terminal D Facility Maintenance Services. You state you are releasing some information to the requestor. Although you take no position on the public availability of the submitted information, you indicate that it may contain proprietary information. You state, and provide documentation showing, that you notified Cofely Services, Inc. ("Cofely"); ERMIC IV, L.P. ("ERMIC"); JBT Aero Tech Airport Services ("JBT"); and TDIndustries, Inc. ("TDI") of the request and of their opportunity to submit comments to this office as to why the submitted information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclosure under Act in certain circumstances). We have received comments from Cofely, ERMIC, and JBT. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from TDI. Therefore, we have no basis to conclude TDI has a protected

proprietary interest in any portion of its information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the board may not withhold any portion of TDI's proposal based upon the proprietary interests of TDI.

Next, we understand Cofely, ERMCo, and JBT to assert that their information is confidential because the documents were marked as such when they were submitted to the board. We note that information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Next, Cofely, ERMCo, and JBT argue that some of their information is excepted from disclosure pursuant to section 552.104 of the Government Code. Section 552.104 excepts "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects the competitive interests of governmental bodies such as the board, not the proprietary interests of private parties, such as Cofely, ERMCo, and JBT. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the board did not raise section 552.104 as an exception to disclosure. Therefore, the board may not withhold any of the submitted information under section 552.104 of the Government Code.

Cofely, ERMCo, and JBT claim that some of their information is excepted from disclosure pursuant to section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552. Section 757 provides that a trade secret is:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage

over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.¹ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5-6 (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm).

Cofely and JBT argue portions of their submitted information are trade secrets under section 552.110(a). Upon review, we agree that some of JBT's customer information is a

¹The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

trade secret under section 552.110(a). Therefore, the board must withhold the customer information we have marked under section 552.110(a) as a trade secret. However, we note JBT has made the identities of some of its customers, which it seeks to withhold, publicly available on its website. Thus, JBT has failed to demonstrate the information published on its website is a trade secret. Further, we find Cofely and JBT have failed to establish that any of the remaining information is a trade secret protected by section 552.110(a). *See* Open Record Decision Nos. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim); 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, and qualifications and experience). Thus, the board may not withhold any portion of the remaining information under section 552.110(a) of the Government Code.

Cofely, ERMIC, and JBT claim their information at issue is subject to section 552.110(b). Upon review, we find JBT has demonstrated release of some of its pricing information would cause the company competitive harm. Thus, the board must withhold the pricing information we have marked under section 552.110(b) of the Government Code. However, we find that Cofely, ERMIC, and JBT have failed to provide specific factual evidence demonstrating that release of any of the remaining information would result in substantial competitive harm to the companies. *See* ORDs 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5, 319 at 3. Furthermore, we note that the pricing information of a winning bidder, such as ERMIC, is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, we determine that no portion of the remaining information is excepted from disclosure under section 552.110(b) of the Government Code.

We note JBT and ERMIC raise section 552.101 of the Government Code for their remaining information. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 protects information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). In addition, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2000), 575 at 2 (1990). However, JBT has not directed our attention to any law under which any of its information is considered to be confidential for the purposes of section 552.101.

We, therefore, conclude that the board may not withhold any of JBT's submitted information under section 552.101 of the Government Code. We note, however, that ERM's proposal contains information subject to common-law privacy. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82.

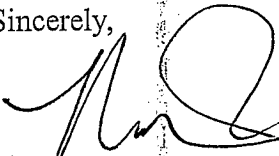
This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 523 (1989), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Upon review, we find a portion of the remaining information, which we have marked, is highly intimate or embarrassing and not of legitimate public concern. Therefore, the board must withhold the marked information pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the board must withhold the information we have marked under section 552.110 of the Government Code and section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/em

Ref: ID# 411901

Enc. Submitted documents

cc: Requestor
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